TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 311

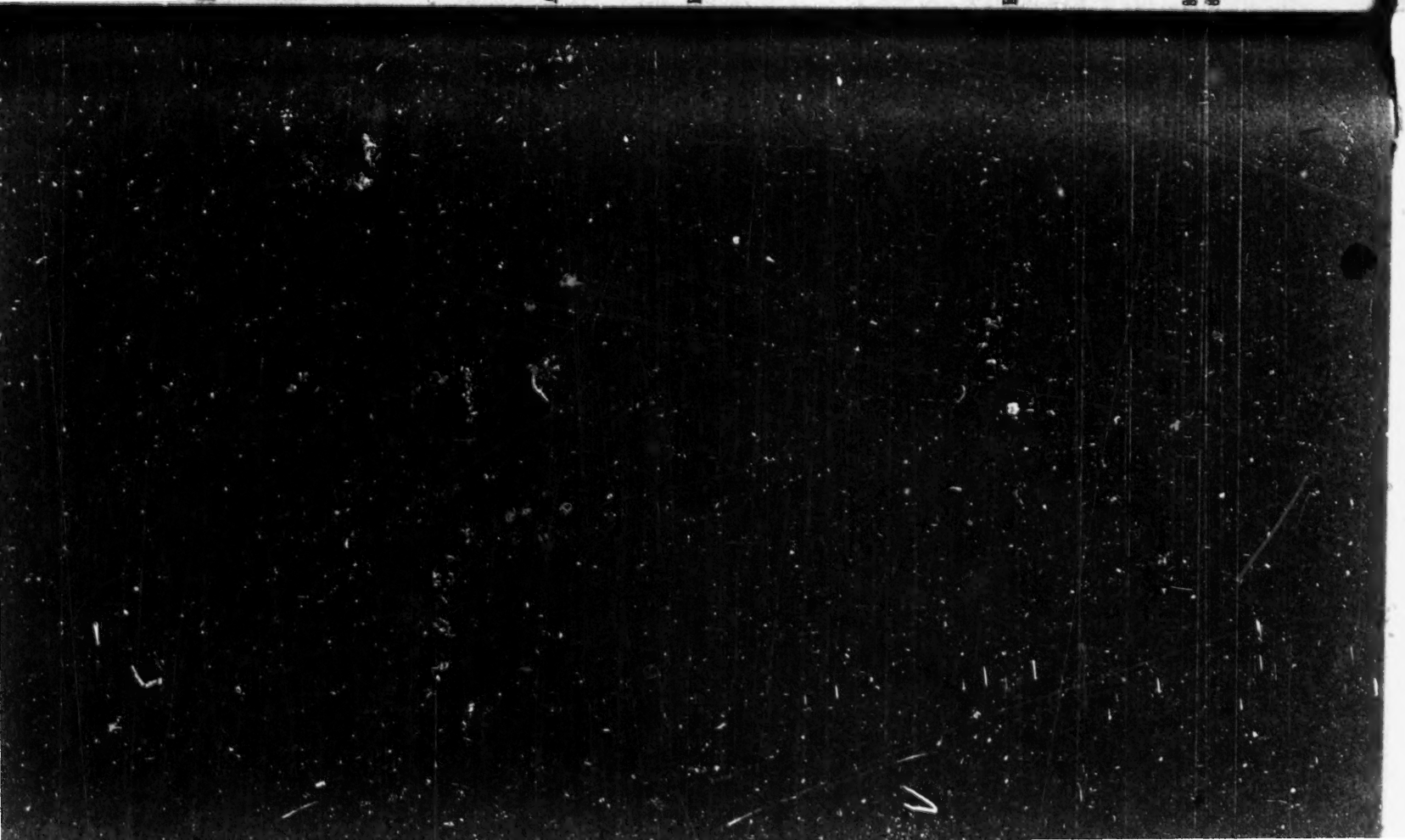
THE UNITED STATES OF AMERICA, APPELLANT

vs.

COLGATE-PALMOLIVE-PEET COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

FILED AUGUST 30, 1938



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In United States District Court, District of New Jersey

I, Benjamin F. Havens, Clerk of the District Court of the United States for the District of New Jersey, do hereby certify that the annexed is a true copy of Indictment No. 7920b in U. S. vs. Colgate-Palmolive Peet Company, a corporation, filed April 9, 1937, as the same remains of record, and on file in my office.

In testimony whereof, I have hereto subscribed my name and affixed the seal of said Court,, at Trenton, in said District, this 26th day of August A. D. nineteen hundred and thirty-eight.

BENJAMIN F. HAVENS,
Clerk.

[SEAL]

Per AMY D. BOND,
Deputy Clerk.

In United States District Court, District of New Jersey

Indictment

Filed April 9, 1937

In the District Court of the United States of America in and for the District of New Jersey, at the January Term thereof, in the year 1937.

The Grand Jurors of the United States of America duly empaneled, sworn and charged to inquire in and for the body of the said District of New Jersey, upon their oaths present:

COUNT 1

1. That throughout the period extending from January 1, 1932, to and including December 31, 1933, Colgate-Palmolive-Peet Company, hereinafter called defendant, was and still is, a corporation of the State of Delaware, having a place of business in Jersey City, in the State of New Jersey.

2. That throughout said period Erie Railroad Company, and The Cleveland, Cincinnati, Chicago & St. Louis Railroad Company were, and still are, corporation common carriers engaged in the transportation of property, in interstate commerce, by railroad, for hire, and over and by means of their respective connecting railway lines operated a through railway route for the transportation of property, including palm oil, in carload lots, from alongside vessels and other points in New York Harbor to Jeffersonville in the State of Indiana.

3. That throughout said period said common carriers had printed and had published and had filed with the Interstate Commerce Commission schedules and tariffs of rates and charges which named and showed the joint rate and charge of said common carriers, for the transportation of palm oil, in carload lots, from

alongside vessels and other points in said New York Harbor over said through railway route to said Jeffersonville, to be 40 cents per 100 pounds, said rate being hereinafter referred to as the line haul rate; that said schedules and tariffs providing said line haul rate further provided that said line haul rate applied from points within free lighterage limits of said New York Harbor provided for and in accordance with certain tariffs and schedules governing the acceptance and handling of freight, at, and for all deliveries in, said New York Harbor, which said last mentioned tariffs and schedules had been duly printed and had been published and had been filed with the Interstate Commerce Commission by said Erie Railroad Company; that said last mentioned schedules and tariffs provided and defined free lighterage and floatage limits in said New York Harbor and further provided that, when ordered by the shipper or consignee in writing and tank barges were available, such articles therein designated as "not lighterage free," including palm oil, would be handled in tank barges in lots of 240,000 pounds or more, in lieu of tank cars on floats, from alongside steamship in said free lighterage and floatage limits in said New York Harbor as defined in said schedules and tariffs, to the rail terminals of said Erie Railroad Company, the transfer from tank barges to tank cars to be at the expense of the shipper or consignee, for which service a charge of 2 cents per 100 pounds, hereinafter referred to as pumping charge, would be made in addition to said line haul rate; that said rate of 40 cents per 100 pounds and said pumping charge of 2 cents per 100 pounds were the lawful rates and the only lawful rates applicable on the shipment of palm oil hereinafter described.

4. That during said period on, to wit, September 26, 1932, said defendant tendered to said Erie Railroad Company at Pier 36, Brooklyn, in the State of New York, said point being within said free lighterage and floatage limits of said New York Harbor as defined in said schedules and tariffs, a shipment of palm oil of an aggregate weight of, to wit, 302,300 pounds, that being five carload lots, which said palm oil had theretofore transported to said New York Harbor by a certain vessel, to wit, S. S. "West Humhaw," with direction to transport said 302,300 pounds of palm oil from said Pier 36 in said New York Harbor, over said connecting railway lines, to said Jeffersonville, consigned to said defendant.

5. That during said period on, to wit, September 23, 1932, said defendant did order in writing from said Erie Railroad Company tank barges in lieu of tank cars on floats for the handling from alongside said vessel in said New York Harbor to the rail terminal of said Erie Railroad Company at Long Dock, Jersey City in the State of New Jersey, of said lot of palm oil which had been transported as aforesaid to said New York Harbor by said vessel.

6. That said Erie Railroad Company did thereupon at said Pier 36, accept delivery of said 302,300 pounds of palm oil and, tank barges being then and there available, did handle by and through its agent, Manhattan Lighterage Corporation, a corporation of the State of

ew York, said lot of palm oil by tank barge from said Pier 36 to id rail terminal at said Long Dock, and at said Long Dock did ump, by and through its agent, said Manhattan Lighterage Corpora- ion, said palm oil into certain railway tank cars bearing the initials nd numbers TPCX 102, SHPX 9109, SHPX 9101, SHPX 9146, and HPX 9118; that thereafter said common carriers did transport by ailroad said shipment loaded in and upon said railway tank cars s aforesaid, over said connecting railway line, and in and through he District of New Jersey and within the jurisdiction of this Court, o said Jeffersonville, and did deliver said shipment at said Jefferson- ille to said defendant and did collect from said defendant freight harges in the amount of, to wit, $1,209.20, based only upon the afore- id line haul rate of 40 cents per 100 pounds and said weight of, to it, 302,300 pounds.

7. That on, to wit, October 17, 1932, said Manhattan Lighterage orporation, pursuant to an arrangement and agreement theretofore ade with said defendant, and with intent secretly to assume and sorb for the benefit of said defendant said pumping charge of 2 nts per 100 pounds provided in said schedules and tariffs and appli- ble upon said shipment of palm oil, did pay and cause to be paid to said Erie Railroad Company, said pumping charge in the sum of, to wit, $60.49, being at the rate of 2 cents per 100 pounds upon the aforesaid weight of, to wit, 302,300 pounds.

8. That said defendant did pay for the transportation, including id pumping of oil from tank barges to tank cars, said sum of ,209.20, and only said sum of $1,209.20, instead of the lawful aggre- te freight charge, applicable under the aforesaid tariffs and sched- es, of, to wit, $1,269.69, based and computed upon said line haul te of 40 cents per 100 pounds, and said weight of, to wit, 302,300 unds, plus said pumping charge of 2 cents per 100 pounds and said eight of, to wit, 302,300 pounds; that said defendant did refrain om paying said common carriers or either of them, or said Man- ttan Lighterage Corporation or any other person or corporation, id pumping charge of 2 cents per 100 pounds applicable upon said ipment of palm oil under and by virtue of said tariffs and schedules.

9. That on, to wit, October 17, 1932, Colgate-Palmolive-Peet Com- ny, defendant aforesaid, in the District of New Jersey and within e jurisdiction of this Court, well knowing the premises aforesaid, lawfully did knowingly, by means of the device aforesaid, solicit, cept, and receive a concession of 2 cents per 100 pounds in respect the transportation of the aforesaid shipment of property by said mmon carriers in interstate commerce, whereby said property was nsported for said defendant from said point in New York Harbor said Jeffersonville at a less rate and charge than that named and ovided in the schedules and tariffs of said common carriers pub- hed and filed as aforesaid; contrary to the form of the statute in ch case made and provided and against the peace and dignity of e United States.

6 COUNT 2

And the Grand Jurors aforesaid, upon their oaths, aforesaid, do further present:

1. That throughout the period extending from January 1, 193 to and including December 31, 1933, Colgate-Palmolive-Peet Com pany, hereinafter called defendant, was and still is, a corporation of the State of Delaware, having a place of business in Jersey City in the State of New Jersey.

2. That throughout said period New York, Susquehanna and Western Railroad Company, Erie Railroad Company, and The Cleveland, Cincinnati, Chicago & St. Louis Railroad Company were, and still are, corporation common carriers engaged in the transportation of property, in interstate commerce, by railroad for hire, and over and by means of their respective connecting railway lines operated a through railway route for the transportation of property, including palm oil, in carload lots, from alongside vessels and other points in New York Harbor to Jeffersonville in the State of Indiana.

3. That throughout said period said common carriers had printed and had published and had filed with the Interstate Commerce Commission schedules and tariffs of rates and charges which named and showed the joint rate and charge of said common carriers, for the transportation of palm oil, in carload lots, from alongside vessels and other points in said New York Harbor, over said through railway route to said Jeffersonville, to be 40 cents per 100 pounds, said rate being hereinafter referred to as the line haul rate; that said schedules and tariffs providing said line haul rate further
7 provided that said line haul rate applied from points within free lighterage limits of said New York Harbor provided for and in accordance with certain tariffs and schedules governing the acceptance and handling of freight, at, and for all deliveries in, said New York Harbor, which said last mentioned tariffs and schedules had been duly printed and had been published and had been filed with the Interstate Commerce Commission by said New York, Susquehanna and Western Railroad Company; that said last mentioned schedules and tariffs provided and defined free lighterage and floatage limits in said New York Harbor and further provided that, when ordered by the shipper or consignee in writing and tank barges were available, such articles therein designated as "not lighterage free," including palm oil, would be handled in tank barges in lots of 240,000 pounds or more, in lieu of tank cars on floats, from alongside steamship in said free lighterage and floatage limits in said New York Harbor as defined in said schedules and tariffs, to the rail terminals of said Erie Railroad Company, the transfer from tank barges to tank cars to be at the expense of the shipper or consignee, for which service a charge of 2 cents per 100 pounds, hereinafter referred to as pumping charge, would be made in addition to said line haul rate; that said rate of 40 cents per 100 pounds and said pumping charge of 2 cents per 100 pounds were the lawful

ates and the only lawful rates applicable on the shipment of palm il hereinafter described.

4. That during said period on, to wit, July 23, 1932, said defendnt tendered to said New York, Susquehanna and Western Railroad ompany at Pier 3, Bush Docks, in the State of New York, said point being within said free lighterage and floatage limits of said New York Harbor as defined in said schedules and tariffs, together with other shipments of palm oil weighing in excess f 240,000 pounds, a shipment of palm oil of an aggregate weight of, wit, 60,000 pounds, that being a carload lot, which said palm oil as part of a larger lot of palm oil theretofore transported to said ew York Harbor by a certain vessel, to wit, "S. S. Salawatti," ith directions to transport said 60,000 pounds of palm oil from id Pier 3 in said New York Harbor, over said connecting railway nes, to said Jeffersonville, consigned to said defendant.

5. That during said period on, to wit, July 23, 1932, said defendant id order in writing from said New York, Susquehanna and Western ailroad Company tank barges in lieu of tank cars on floats for the andling from alongside said vessel in said New York Harbor to the il terminal of said New York, Susquehanna and Western Railroad ompany at Edgewater in the State of New Jersey, of said lot of alm oil which had been transported as aforesaid to said New York arbor by said vessel.

6. That said New York, Susquehanna and Western Railroad Comany did thereupon at said Pier 3, accept delivery of said 60,000 ounds of palm oil and, tank barges being then and there available, id handle by and through its agent, New York Tank Barge Co., Inc., corporation of the State of New York, said lot of palm oil by tank arge from said Pier 3 to said rail terminal at said Edgewater, and said Edgewater did pump, by and through its agent, said New ork Tank Barge Co., Inc., said palm oil into a certain railway tank car bearing the initials and number, SHPX 9100; that thereafter said common carriers did transport by railroad said shipment loaded in and upon said railway tank car as aforesaid, er said connecting railway line, and in and through the District of ew Jersey and within the jurisdiction of this Court, to said Jeffernville, and did deliver said shipment at said Jeffersonville to said fendant and did collect from said defendant freight charges in the mount of, to wit, $240.00 based only upon the aforesaid line haul rate 40 cents per 100 pounds and said weight of, to wit, 60,000 pounds.

7. That on, to wit, July 25, 1932, said New York Tank Barge Co., c., pursuant to an arrangement and agreement theretofore made ith said defendant, and with intent secretly to assume and absorb r the benefit of said defendant said pumping charge of 2 cents per 0 pounds provided in said schedules and tariffs and applicable upon id shipment of palm oil, did pay and cause to be paid to said New ork, Susquehanna and Western Railroad Company, said pumping arge in the sum of, to wit, $12.00, being at the rate of 2 cents per 0 pounds upon the aforesaid weight of, to wit, 60,000 pounds.

8. That said defendant did pay for the transportation, including said pumping of oil from tank barge to tank car, said sum of $240.00 and only said sum of $240.00, instead of the lawful aggregate freight charge applicable under the aforesaid tariffs and schedules of, to wit, $252.00, based and computed upon said line haul rate of 40 cents per 100 pounds, and said weight of, to wit, 60,000 pounds, plus said pumping charge of 2 cents per 100 pounds and said weight of, to wit, 60,000 pounds; that said defendant did refrain from paying said common carriers or either of them, or said New York Tank Barge Co., Inc., or any other person or corporation, said pumping charge of 2 cents per 100 pounds applicable upon said shipment of palm oil under and by virtue of said tariffs and schedules.

9. That on, to wit, September 25, 1932, Colgate-Palmolive-Peet Company, defendant aforesaid, in the District of New Jersey and within the jurisdiction of this Court, well knowing the premises aforesaid, unlawfully did knowingly, by means of the device aforesaid, solicit, accept and receive a concession of 2 cents per 100 pounds in respect of the transportation of the aforesaid shipment of property by said common carriers in interstate commerce, whereby said property was transported for said defendant from said point in New York Harbor to said Jeffersonville at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

COUNT 3

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraphs numbered 1, 2, and 3 of the second count of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were herein repeated.

2. That during said period on, to wit, July 23, 1932, said defendant tendered to said New York, Susquehanna and Western Railroad Company at Pier 3, Bush Docks, in the State of New York, said point being within said free lighterage and floatage limits of said New York Harbor as defined in said schedules and tariffs, together with other shipments of palm oil weighing in excess of 240,000 pounds, a shipment of palm oil of an aggregate weight of, to wit, 60,000 pounds, that being a carload lot, which said palm oil was part of a larger lot of palm oil theretofore transported to said New York Harbor by a certain vessel, to wit, S. S. "Salawatti," with directions to transport said 60,000 pounds of palm oil from said Pier 3 in said New York Harbor, over said connecting railway lines, to said Jeffersonville, consigned to said defendant.

3. That during said period on, to wit, July 23, 1932, said defendant did order in writing from said New York, Susquehanna and Western Railroad Company tank barges in lieu of tank cars on floats for the

andling from alongside said vessel in said New York Harbor to e rail terminal of said New York, Susquehanna and Western Rail-ad Company at Edgewater in the State of New Jersey, of said lot palm oil which had been transported as aforesaid to said New York Harbor by said vessel.

4. That said New York, Susquehanna and Western Railroad Company did thereupon at said Pier 3, accept delivery of said ,000 pounds of palm oil and, tank barges being then and there ailable, did handle by and through its agent, New York Tank arge Co., Inc., a corporation of the State of New York, said lot of alm oil by tank barge from said Pier 3 to said rail terminal at said dgewater, and at said Edgewater did pump, by and through its gent, said New York Tank Barge Co., Inc., said palm oil into a rtain railway tank car bearing the initials and number, EMTX 8001; at thereafter said common carriers did transport by railroad said ipment loaded in and upon said railway tank car as aforesaid, over id connecting railway line, and in and through the District of New rsey and within the jurisdiction of this Court, to said Jeffersonville, d did deliver said shipment at said Jeffersonville to said defendant d did collect from said defendant freight charges in the amount of, wit, $240.00 based only upon the aforesaid line haul rate of 40 nts per 100 pounds and said weight of, to wit, 60,000 pounds.

5. That on, to wit, July 25, 1932, said New York Tank Barge Co., c., pursuant to an arrangement and agreement theretofore made ith said defendant, and with intent secretly to assume and absorb r the benefit of said defendant said pumping charge of 2 cents per 0 pounds provided in said schedules and tariffs and applicable upon id shipment of palm oil, did pay and cause to be paid to said New ork, Susquehanna and Western Railroad Company, said pumping arge in the sum of, to wit, $12.00, being at the rate of 2 cents per 100 pounds upon the aforesaid weight of, to wit, 60,000 pounds.

6. That said defendant did pay for the transportation, including said pumping of oil from tank barge to tank car, said m of $240.00, and only said sum of $240.00, instead of the lawful gregate freight charge applicable under the aforesaid tariffs and edules of, to wit, $252.00, based and computed upon said line haul e of 40 cents per 100 pounds, and said weight of, to wit, 60,000 unds, plus said pumping charge of 2 cents per 100 pounds and said ight of, to wit, 60,000 pounds; that said defendant did refrain om paying said common carriers or either of them, or said New rk Tank Barge Co., Inc., or any other person or corporation, said mping charge of 2 cents per 100 pounds applicable upon said ship-nt of palm oil under and by virtue of said tariffs and schedules.

7. That on, to wit, July 25, 1932, Colgate-Palmolive-Peet Com-ny, defendant aforesaid, in the District of New Jersey and within jurisdiction of this Court, well knowing the premises aforesaid, lawfully did knowingly, by means of the device aforesaid, solicit, cept and receive a concession of 2 cents per 100 pounds in respect the transportation of the aforesaid shipment of property by said

common carriers in interstate commerce, whereby said property was transported for said defendant from said point in New York Harbor to said Jeffersonville at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

14 COUNT 4

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraphs numbered 1, 2, and 3 of the second count of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were herein repeated.

2. That during said period on, to wit, July 23, 1932, said defendant tendered to said New York, Susquehanna, and Western Railroad Company at Pier 3, Bush Docks, in the State of New York, said point being within said free lighterage and floatage limits of said New York Harbor as defined in said schedules and tariffs, together with other shipments of palm oil weighing in excess of 240,000 pounds, a shipment of palm oil of an aggregate weight of, to wit, 60,000 pounds, that being a carload lot, which said palm oil was part of a larger lot of palm oil theretofore transported to said New York Harbor by a certain vessel, to wit, S. S. "Salawatti," with directions to transport said 60,000 pounds of palm oil from said Pier 3 in said New York Harbor, over said connecting railway lines, to said Jeffersonville, consigned to said defendant.

3. That during said period on, to wit, July 23, 1932, said defendant did order in writing from said New York, Susquehanna and Western Railroad Company tank barges in lieu of tank cars on floats for the handling from alongside said vessel in said New York Harbor to the rail terminal of said New York, Susquehanna and Western
15 Railroad Company at Edgewater in the State of New Jersey, of said lot of palm oil which had been transported as aforesaid to said New York Harbor by said vessel.

4. That said New York, Susquehanna and Western Railroad Company did thereupon at said Pier 3, accept delivery of said 60,000 pounds of palm oil and, tank barges being then and there available, did handle by and through its agent, New York Tank Barge Co., Inc., a corporation of the State of New York, said lot of palm oil by tank barge from said Pier 3 to said rail terminal at said Edgewater, and at said Edgewater did pump, by and through its agent, said New York Tank Barge Co., Inc., said palm oil into a certain railway tank car bearing the initials and number STCX 9066; that thereafter said common carriers did transport by railroad said shipment loaded in and upon said railway tank car as aforesaid, over said connecting railway line, and in and through the District of

New Jersey and within the jurisdiction of this Court, to said Jeffersonville, and did deliver said shipment at said Jeffersonville to said defendant and did collect from said defendant freight charges in the amount of, to wit, $240.00 based only upon the aforesaid line haul rate of 40 cents per 100 pounds and said weight of, to wit, 60,000 pounds.

5. That on, to wit, July 25, 1932, said New York Tank Barge Co., Inc., pursuant to an arrangement and agreement theretofore made with said defendant, and with intent secretly to assume and absorb for the benefit of said defendant said pumping charge of 2 cents per 100 pounds provided in said schedules and tariffs and
16 applicable upon said shipment of palm oil, did pay and cause to be paid to said New York, Susquehanna and Western Railroad Company, said pumping charge in the sum of, to wit, $12.00, being at the rate of 2 cents per 100 pounds upon the aforesaid weight of, to wit, 60,000 pounds.

6. That said defendant did pay for the transportation, including said pumping of oil from tank barge to tank car, said sum of $240.00, and only said sum of $240.00, instead of the lawful aggregate freight charge applicable under the aforesaid tariffs and schedules of, to wit, $252.00, based and computed upon said line haul rate of 40 cents per 100 pounds, and said weight of, to wit, 60,000 pounds, plus said pumping charge of 2 cents per 100 pounds and said weight of, to wit, 60,000 pounds; that said defendant did refrain from paying said common carriers or either of them, or said New York Tank Barge Co., Inc., or any other person or corporation, said pumping charge of 2 cents per 100 pounds applicable upon said shipment of palm oil under and by virtue of said tariffs and schedules.

7. That on, to wit, July 25, 1932, Colgate-Palmolive-Peet Company, defendant aforesaid, in the District of New Jersey and within the jurisdiction of this Court, well knowing the premises aforesaid, unlawfully did knowingly, by means of the device aforesaid, solicit, accept and receive a concession of 2 cents per 100 pounds in respect of the transportation of the aforesaid shipment of property by said common carriers in interstate commerce, whereby said property was transported for said defendant from said point in New York Harbor to said Jeffersonville at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

17

COUNT 3

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraphs numbered 1, 2, and 3 of the second count of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were herein repeated.

2. That during said period on, to wit, July 23, 1932, said defendant tendered to said New York, Susquehanna and Western Railroad Company at Pier 3, Bush Docks, in the State of New York, said point being within said free lighterage and floatage limits of said New York Harbor as defined in said schedules and tariffs, together with other shipments of palm oil weighing in excess of 240,000 pounds, a shipment of palm oil of an aggregate weight of, to wit, 60,000 pounds, that being a carload lot, which said palm oil was part of a larger lot of palm oil theretofore transported to said New York Harbor by a certain vessel, to wit, S. S. "Salawatti," with directions to transport said 60,000 pounds of palm oil from said Pier 3 in said New York Harbor, over said connecting railway lines, to said Jeffersonville, consigned to said defendant.

3. That during said period on, to wit, July 23, 1932, said defendant did order in writing from said New York, Susquehanna and
18 Western Railroad Company tank barges in lieu of tank cars on floats for the handling from alongside said vessel in said New York Harbor to the rail terminal of said New York, Susquehanna and Western Railroad Company at Edgewater in the State of New Jersey, of said lot of palm oil which has been transported as aforesaid to said New York Harbor by said vessel.

4. That said New York, Susquehanna and Western Railroad Company did thereupon at said Pier 3, accept delivery of said 60,000 pounds of palm oil and, tank barges being then and there available, did handle by and through its agent, New York Tank Barge Co., Inc., a corporation of the State of New York, said lot of palm oil by tank barge from said Pier 3 to said rail terminal at said Edgewater, and at said Edgewater did pump, by and through its agent, said New York Tank Barge Co., Inc., said palm oil into a certain railway tank car bearing the initials and number, EMTX 8002; that thereafter said common carriers did transport by railroad said shipment loaded in and upon said railway tank car as aforesaid, over said connecting railway line, and in and through the District of New Jersey and within the jurisdiction of this Court, to said Jeffersonville, and did deliver said shipment at said Jeffersonville to said defendant and did collect from said defendant freight charges in the amount of, to wit, $240.00 based only upon the aforesaid line haul rate of 40 cents per 100 pounds and said weight of, to wit, 60,000 pounds.

5. That on, to wit, July 25, 1932, said New York Tank Barge Co., Inc., pursuant to an arrangement and agreement theretofore
19 made with said defendant, and with intent secretly to assume and absorb for the benefit of said defendant said pumping charge of 2 cents per 100 pounds provided in said schedules and tariffs and applicable upon said shipment of palm oil, did pay and cause to be paid to said New York, Susquehanna and Western Railroad Company, said pumping charge in the sum of, to wit, $12.00, being at the rate of 2 cents per 100 pounds upon the aforesaid weight of, to wit, 60,000 pounds.

6. That said defendant did pay for the transportation, including said pumping of oil from tank barge to tank car, said sum of $240.00, and only said sum of $240.00, instead of the lawful aggregate freight charge applicable under the aforesaid tariffs and schedules of, to wit, $252.00, based and computed upon said line haul rate of 40 cents per 100 pounds, and said weight of, to wit, 60,000 pounds, plus said pumping charge of 2 cents per 100 pounds and said weight of, to wit, 60,000 pounds; that said defendant did refrain from paying said common carriers or either of them, or said New York Tank Barge Co., Inc., or any other person or corporation, said pumping charge of 2 cents per 100 pounds applicable upon said shipment of palm oil under and by virtue of said tariffs and schedules.

7. That on, to wit, July 25, 1932, Colgate-Palmolive-Peet Company, defendant aforesaid, in the District of New Jersey and within the jurisdiction of this Court, well knowing the premises aforesaid, unlawfully did knowingly, by means of the device aforesaid, solicit, accept, and receive a concession of 2 cents per 100 pounds in respect of the transportation of the aforesaid shipment of property by said common carriers in interstate commerce, whereby said property was transported for said defendant from said point in New York Harbor to said Jeffersonville at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

JOHN J. QUINN,
United States Attorney.

The United States of America vs. Colgate-Palmolive Peet Company, a corporation. Indictment for Viol. Sec. 1, Elkins Act; Sec. 1, Title 49 U. S. C. A True Bill. J. L. Williamson, Foreman. John J. Quinn, U. S. Attorney.

[File endorsement omitted.]

In United States District Court, District of New Jersey

Criminal No. 7920–b

[Title omitted.]

Plea in bar to indictment

Filed June 18, 1937

This defendant, Colgate-Palmolive-Peet Company, a corporation, by its attorneys in this behalf, Wall, Haight, Carey & Hartpence, comes into court here, and having heard read the said alleged indictment found at the January Term of this court in the year 1937, which said alleged indictment was filed April 9, 1937, says that the United

States of America ought not further to prosecute said indictment, or any count thereof, against it, because of the following matters and things, which it pleads in bar of its prosecution for any and all of the alleged offenses therein charged, and respectfully avers as follows, to wit:

1. That the alleged offenses attempted to be set forth in each and every count of the said alleged indictment, if committed at all, were committed more than three years preceding the return of the alleged indictment herein, during which period said defendant had not fled justice, and consequently prosecution thereof is barred by the statute of limitations applicable thereto, 18 U. S. Code, section 582.

22 2. Defendant repeats and realleges the averments of Paragraph 1 hereof, and further shows that, at the April Term in the year 1934 of this court, an indictment was returned by the Grand Jury, being file number 6817–b, covering the same offenses attempted to be alleged in and by the present alleged indictment. That thereafter defendant filed a motion to quash the indictment returned by the April 1934 Grand Jury, and thereafter, to wit: March 15, 1937, an order was entered at the instance of the United States Attorney in that said cause, reading as follows:

"It appearing that motions to quash the indictment have been filed in the above matter, which said motions raise the same points as were raised in a similar motion filed in United States v. Durkee Famous Foods, Inc., No. 6821–b; and

"It further appearing that a memorandum opinion has been filed in the last mentioned case and an order quashing the indictment in that case having been entered in accordance therewith,

"Now, March 15, 1937, for the reasons set forth in the opinion filed in United States vs. Durkee Famous Foods, Inc., No. 6821–b, the indictment in this case be and it is hereby quashed.

"GUY L. FAKE, *Judge.*"

That the indictment herein returned by the January 1937 Grand Jury was not returned in conformity with 18 U. S. Code, section 557, which provides only for the return of a new indictment where one has been found defective, "at any time during the next succeeding term of court following such finding, during which a grand jury thereof shall be in session," inasmuch as the next succeeding term of court following March 15, 1937, was the April Term commencing April 6, 1937.

23 3. The defendant realleges and reaffirms the averments of Paragraphs 1 and 2 hereof, and further shows that, as appears from the opinion of the court filed in United States vs. Durkee Famous Foods, Inc., No. 6821–b, the indictment returned by the April 1934 Grand Jury, No. 6817–b, was by the court found bad in substance and the allegations thereof not to constitute a crime. The said order quashing said indictment was therefore an appealable order under 18 U. S. Code, section 682, and consequently 18 U. S.

Code, Section 587, has no application to such an order, but is, and is intended to be, confined to the quashing of indictments for defects of form and pleadings, which orders are not appealable under 18 U. S. Code, section 682.

All of which said defendant, Colgate-Palmolive-Peet Company, a corporation, is ready and willing to verify, and therefore pleads the same in bar of any prosecution or punishment under said indictment or any count thereof, and says that to prosecute or punish it thereunder for any of the alleged offenses charged therein is contrary to the provisions of the statute of limitations, 18 U. S. Code, section 582.

Wherefore, the defendant prays judgment that the said alleged indictment be not further prosecuted against it, and that by
24 this court it may be dismissed and discharged from the said premises without day and the said alleged indictment held for naught and quashed.

Dated: Trenton, N. J., June 18th, 1937.

COLGATE-PALMOLIVE-PEET COMPANY,
a corporation, *Defendant*,
By WALL, HAIGHT, CAREY & HARTPENCE,
Attorneys, Office and Post Office Address,
15 Exchange Place, Jersey City, N. J.

We hereby certify that the foregoing plea in bar is not interposed for delay, and in our opinion is well founded in point of law.

Dated: Trenton, N. J., June 18, 1937.

WALL, HAIGHT, CAREY & HARTPENCE,
By JOHN A. HARTPENCE,
Counsel for Defendant,
Colgate-Palmolive-Peet Company, a corporation.

[File endorsement omitted.]

25 In United States District Court for the District of New Jersey

Criminal No. 7920-b

[Title omitted.]

Answer of United States to plea in bar to indictment

Filed Aug. 2, 1937

And now, August 2nd, 1937, comes the United States of America, by John J. Quinn, United States Attorney in and for the District of New Jersey, and in answer to the Plea in Bar to the indictment filed April 9, 1937, in the above matter, respectfully represents:

1. That in answer to the averments contained in paragraph numbered 1 of the Plea in Bar it is admitted that the alleged offenses set forth in each and every count of said indictment were committed more than three years preceding April 9, 1937, the date when said

indictment was returned, during which period said defendant had not fled justice, but denies that prosecution of each and every offense alleged to have been committed in said indictment is barred by the statute of limitations.

26 2. That in answer to the averments contained in paragraph numbered 2 of the Plea in Bar it is admitted that at the April Term in the year 1934 of this Court an indictment was returned by the grand jury, at file No. 6817b, covering the same offenses alleged in and by the present indictment; that thereafter defendant herein filed a motion to quash said indictment returned by the April 193 grand jury, and that thereafter on March 15, 1937, an order was entered on defendant's motion to quash said indictment in the language set out in paragraph 2 of the Plea in Bar; but denies that the indictment herein, which was returned by the January 1937 grand jury, was not returned in conformity with 18 U. S. Code, Section 587, and further avers that under and by virtue of 18 Code, Sec. 58 limitation of prosecution of the offenses alleged in the indictment herein to have been committed by said defendant, was stayed.

3. That in answer to the averments contained in paragraph numbered 3 of said Plea in Bar it is denied that the opinion of the Court upon which the aforesaid order quashing said previous indictment was made held that said previous indictment was bad in substance in that no offense described by 49 U. S. Code, Sec. 41, had been alleged to have been committed, but avers that said opinion holding that said previous indictment was insufficient was based upon a construction of said indictment so as to demonstrate the failure of the government to allege essential facts necessary to bring the

27 offense within the provisions of 49 U. S. Code, Section 41; and in further answer it is averred that, whether or not the order made quashing said previous indictment was an appealable order under 18 U. S. Code, Section 682, is immaterial in so far as the application of 18 U. S. Code, Section 587, is concerned.

4. And in further general answer it is averred that the indictment herein, filed April 9, 1937, is otherwise good and sufficient in law.

Wherefore, the United States of America prays that said Plea in Bar be forthwith dismissed and that said defendant be put upon trial.

UNITED STATES OF AMERICA,
By JOHN J. QUINN,
United States Attorney.
WILLIAM F. SMITH,
Assistant United States Attorney.
DANIEL H. KUNKEL,
Special Assistant to the United States Attorney.

[File endorsement omitted.]

28 In United States District Court, District of New Jersey

Criminal No. 7918–b

UNITED STATES OF AMERICA

v.

DURKEE FAMOUS FOODS, INC.

Criminal No. 7919–b

UNITED STATES OF AMERICA

v.

MANHATTAN LIGHTERAGE CORPORATION

Criminal No. 7920–b

UNITED STATES OF AMERICA

v.

COLGATE-PALMOLIVE-PEET COMPANY

Opinion

(On defendants' pleas in bar to indictments)

NEWARK, N. J.,
Tuesday, June 14, 1938.

Before Hon. GUY L. FAKE, U. S. D. J.

Appearances: Daniel H. Kunkel, Esq., Special Assistant to the United States Attorney, for the Government. Roger Hinds, Esq., for defendant Durkee Famous Foods, Inc. Frank M. Swacker, Esq., for defendant Manhattan Lighterage Corporation. Messrs. Wall, Haight, Carey & Hartpence, by John A. Hartpence, Esq., and Alfred F. Conway, Esq., for defendant Colgate-Palmolive-Peet Company.

W. W. Heironimus, Official Reporter.

29 The COURT (Orally, at close of argument.) The issues here arise on three indictments, to each of which pleas in bar have been filed. This memorandum will be dispositive of the three cases.

The defendants were indicted on the 9th of April 1937, for alleged violations of the Elkins Act, Title 49, Section 41.

The acts complained of in the indictments having been committed, according to the dates set forth therein, more than three years prior to the filing of the indictments, Section 582 of Title 18 of the U. S. Code provides as follows:

"No person shall be prosecuted, tried or punished for any offense, not capital, except as provided in Section 584 of this Title, unless the indictment is found or action is instituted within three years next after such offense shall have been committed."

It is contended for the Government that the pleas should not be sustained because Section 587 of Title 18 of the U. S. Code provides as follows:

"Whenever an indictment is found defective or insufficient for any cause after the period prescribed and the applicable Statute of Limitations has expired, a new indictment may be returned at any time during the next succeeding term of Court following such finding, during which the Grand Jury thereof shall be in session."

It is urged that a reasonable and proper consideration of this section causes it to become effective as to the then existing term of Court, notwithstanding the fact that the statute itself is silent as to the then existing term. (Citing Endlich on Interpretation of Statutes, pages 599, etc. U. S. v. N. Y. Central Railroad, 212 U. S. 39, U. S. v. Koenig Coal Co., 270 U. S. 512, U. S. vs. Baltimore
30 Post Co., 2 Fed. (2d) 761, affirmed 268 U. S. 388. Ozawa vs. U. S. 260 U. S. 178.)

Counsel for the defendants argue that to so construe the statute would cause the Court to enter the sphere of the legislature and in effect amend the Act to read as follows:

"A new indictment may be returned at any time during the next succeeding term of court, following such finding, during which the Grand Jury thereof shall be in session and as well at the Term in which the indictment is found defective."

Moreover, it is urged that Section 587 must be strictly construed because it is an exception to the Statute of Limitations.

Other arguments are offered by counsel for the defense, which appear in defendant's briefs. They cite the following cases to sustain their position: U. S. v. Shelton, 2 Wheaton 119–121 and 122. U. S. vs. McElvaine, 272 U. S. 633 at 639. U. S. vs. Scherton, 285 U. S. 518 at 521–2. 16 Corpus Juris 228, Section 350.

The indictments were returned by a Grand Jury sitting for the January Term of Court on April 9, 1937, but within the time fixed by law for the April Term of Court at Newark, the January Term having been extended by an order of the Court.

At the time the previous indictments were quashed by this Court, the three-year Statute of Limitations had then run against the alleged offenses.

* * * * * * *

NEWARK, N. J.,
Monday, June 27, 1938.

(Hearing continued from June 14, 1938. Same appearances.)

The COURT. (Orally, at close of argument.) At the last session I stated the facts and raised the issues upon which counsel have appeared before me today. Both sides have been diligent in their endeavors to assist the Court in ascertaining the law to be followed
31 here. No cases have been discovered bearing upon a construction of the section of the Statute of Limitations which is here involved. This has resulted in much research in an endeavor to find an analogous situation, and upon careful consideration of the arguments presented by counsel, as well as a consideration of the

cases they have cited, it is my conclusion that the Court, being without power to amend the statute involved, and it appearing that the statute itself contains no ambiguity, either patent or latent, must give to the statute the generally accepted meaning of the language used therein. This leads to the inescapable conclusion that where an indictment has been found to be defective after the passage of the prescribed period of limitation, the one and only Grand Jury which can hand down a new indictment is that Grand Jury which is authorized to act at the term next succeeding the term at which the Court found the indictment to be defective; and it appearing, as it does here, that the indictments under review were not found by a Grand Jury authorized as aforesaid, the indictments must necessarily fall.

The pleas in bar are therefore sustained.

22 In United States District Court, District of New Jersey

On Plea in Bar. Criminal No. 7920–B

UNITED STATES OF AMERICA

vs.

COLGATE-PALMOLIVE-PEET COMPANY, DEFENDANT

Order sustaining plea in bar

Filed June 28, 1938

This matter being opened to the Court by John A. Hartpence, Esq., of counsel with the defendant, Colgate-Palmolive-Peet Company, upon said defendant's Plea in Bar to the indictment herein and each and every count thereof, and due notice to plead having been duly served upon the attorney for said defendant by the United States Attorney, and the United States of America appearing by John J. Quinn, Esq., United States Attorney, and Daniel H. Kunkel, Esq., Special Assistant United States Attorney, and the said defendant Colgate-Palmolive-Peet Company appearing by John A. Hartpence, Esq., its attorney, and the Court having heard and considered the matter on argument, and on the briefs of the respective counsel, and it appearing that said Plea in Bar is good and sufficient and should be sustained;

It is, on this 28 day of June, 1938, ordered that the said Plea in Bar to said indictment herein be and the same is hereby sustained, and that said indictment be not further prosecuted against said defendant, and that said indictment be and the same is hereby accordingly dismissed, discharged, held for nought, and quashed.

GUY L. FAKE,
United States District Court Judge.

Consented to as to form only:
JOHN J. QUINN,
United States Attorney.
By: DANIEL H. KUNKEL,
Special Assistant United States Attorney.

[File endorsement omitted.]

33 In United States District Court, District of New Jersey

Order continuing the January 1937 Term of Court at Trenton, New Jersey, to the April 1937 Term of Court at Newark, New Jersey

Filed April 5, 1937

It being presented to the Court by John J. Quinn, United States Attorney for the District of New Jersey, that certain sentences are still pending in cases before this Court, and other business of the United States is still pending before the Court, and application being made,

It is, thereupon on this 5th day of April 1937, ordered that the January 1937 Term of this Court be and the same is hereby extended and continued during the April 1937 Term and until the further order of this Court for the following and all other purposes:

1. In order that the Grand Jury of that term may dispose of its unfinished business.

2. In order that the sentences set forth on the annexed list marked "Schedule A" and all other sentences pending before the Court may be imposed.

3. In order that any other business, procedure, or practice pertaining to the Court or the Government of the United States may be transacted identically as if the January 1937 Term of Court had not expired.

FORMAN, *Judge.*

[File endorsement omitted.]

36 In United States District Court for the District of New Jersey

Criminal No. 7920–B

[Title omitted.]

Petition for appeal

Filed July 25, 1938

Now comes the United States of America, plaintiff, by its counsel and says that on June 28, 1938, this court rendered its judgment in favor of the defendant against the plaintiff, in which judgment and proceedings had prior thereto in said cause certain errors were committed to the prejudice of the plaintiff, all of which will more fully appear from the assignment of errors herewith filed.

Wherefore, United States of America prays that an appeal may issue in its behalf to the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in said cause, duly authenticated

may be transmitted forthwith to the Supreme Court of the United States.

John J. Quinn,
JOHN J. QUINN,
United States Attorney.

Dated this 25th day of July, 1938.

[File endorsement omitted.]

37 In United States District Court for the District of New Jersey

Criminal No. 7920–B

[Title omitted.]

Assignment of errors

Filed July 25, 1938

United States of America, plaintiff, by its counsel, now comes and, in connection with its petition for an appeal, files the following assignment of errors upon which it will rely in its appeal to the Supreme Court of the United States from the final judgment rendered by this Court on June 28, 1938.

The District Court erred:

1. In sustaining the plea in bar.

2. In not overruling and dismissing the plea in bar.

3. In holding and adjudging that the statute of limitations had barred the prosecution of the offenses alleged in the several counts of the indictment.

4. In holding and adjudging that the Act of May 10, 1934 (U. S. C. Title 18, Sec. 587), did not limit the application of the statute of limitations (U. S. C. Title 18, Sec. 582), so as to permit the new indictment to be returned by the grand jury empaneled at and in session during the same term of court at which the prior indictment was found defective and insufficient.

5. In holding and adjudging that the Act of May 10, 1934 (U. S. C. Title 18, Sec. 587), was effective to say the statute of limitations only where the new indictment is returned by a grand jury in session during the next succeeding term of court following the term at
38 which the prior indictment was found defective or insufficient.

6. In failing and refusing to construe the statutes on which the new indictment was founded as permitting the return of the new indictment by the grand jury empaneled at and for and in session during the same term of court at which the prior indictment was found defective or insufficient.

7. In failing and refusing to construe the Act of May 10, 1934 (U. S. C. Title 18, Sec. 587), as permitting the return of the new indictment by the grand jury empaneled at and for and in session during the term of court at which the prior indictment was found defective or insufficient.

8. In failing and refusing to construe the Act of May 16, 19 (U. S. C. Title 18, Sec. 587), as permitting the return of the n indictment by the first grand jury in session upon or following t date upon which the prior indictment was found defective or insu ficient, regardless of whether such grand jury was empaneled for t same term, or the next succeeding term, or some still later term fo lowing the term of court at which the prior indictment was fou defective or insufficient.

9. In entering the order of June 28, 1938, sustaining the plea bar and dismissing and quashing the indictment.

JOHN J. QUINN,
John J. Quinn,
United States Attorney.

Dated this 1st day of July 1938.

[File endorsement omitted.]

39 In United States District Court for the District of New Jersey

Criminal No. 7920–B

[Title omitted.]

Order allowing appeal

Filed July 25, 1938

United States of America, plaintiff, having by its counsel made a filed its petition praying an appeal to the Supreme Court of t United States from the final judgment of this Court entered on Ju 28, 1938, and having also made and filed an assignment of errors, a having in all respects conformed to the statutes and rules of cou in such case made and provided:

It is ordered and adjudged that the appeal be and the same hereby allowed as prayed and made returnable within forty (4 days from the date hereof, and the clerk is directed to transmit forth with to the Supreme Court of the United States a properly authen cated transcript of the record, proceedings, and papers on which sa final judgment was made and entered.

This 25 day of July 1938.

JOHN BOYD AVIS.
United States District Judge.

[File endorsement omitted.]

40 [Citation in usual form showing service on Wall, Haig Casey & Hartpence, filed July 29, 1938, omitted in printing

42 In United States District Court, District of New Jersey

No. 7920–b

[Title omitted.]

Docket entries

1937
Apr. 9—Indictment for Violating Section 1, Elkins Act &c.
June 1—Ordered adjourned to June 18, 1937.
18—Plea in bar by Wall, Haight, Carey, & Hartpence, Attys., Jersey City, N. J., filed.
Aug. 2—Answer of United States to plea in bar filed.
1938
June 14—Argument on plea in bar before Judge Fake.
" —Ord. off to June 27, 1938.
27—Oral Opinion by Judge Fake sustaining plea in bar &c filed.
28—Order sustaining plea in Bar & Dismissing Indictment, &c filed (Fk).
July 25—Petition for Appeal filed.
" —Assignment of Errors filed.
" —Order allowing Appeal filed (Avis).
" —Citation issued.
" —Statement as to Jurisdiction filed.
" —Notice to Appeal.
29— " " " ret'd (executed).
" —Citation ret'd (executed).
30—Praecipe for Transcript of Record filed.

43 In United States District Court for the District of New Jersey

Criminal No. 7920–B

[Title omitted.]

Praecipe for transcript of record

Filed July 30, 1938

To the CLERK OF THE DISTRICT COURT:

Please transmit to the Supreme Court of the United States as the transcript of record in the above entitled case, the following pleadings, documents and records:

1. Indictment.
2. Plea in bar.
3. Answer to plea in bar.
4. Opinion of court sustaining the plea in bar.
5. Order on opinion sustaining the plea in bar and quashing the indictment.
6. Order of Court extending the January 1937 Trenton term.
7. Petition for appeal.
8. Assignment of errors.
9. Statement as to jurisdiction.

11. Notice of service on appellee of petition for appeal, order allowing appeal, assignment of errors, and statement as to jurisdiction.
12. Citation on appeal.
44 13. All docket entries in proper order.
14. Praecipe for transcript of record.
15. Clerk's certificate.

John J. Quinn,
JOHN J. QUINN,
United States Attorney.

Service of a copy of the above praecipe is hereby acknowledged this —— day of July, 1938.

———— ————,
Attorneys for defendant.

[File endorsement omitted.]

45 [Clerk's certificate to foregoing transcript omitted in printing.]

46 In United States District Court, District of New Jersey

Indictment

In the District Court of the United States of America in and for the District of New Jersey, at the April Term thereof, in the year 1934.

The Grand Jurors of the United States of America duly empaneled, sworn and charged to inquire in and for the body of the said District of New Jersey, upon their oaths present:

COUNT 1

1. That throughout the period extending from January 1, 1932, to and including September 30, 1933, Colgate-Palmolive-Peet Company, hereinafter called defendant, was and still is, a corporation of the State of Delaware, having a place of business in Jersey City, in the State of New Jersey.

2. That throughout said period Manhattan Lighterage Corporation was and still is a corporation of the State of New York, and was engaged, among other things, in the operation of tank barges in New York Harbor and in the business of transporting by tank barge certain bulk fluid commodities, to wit, palm oil, cocoanut oil, olive oil foots, china wood oil, perilla oil, soya bean oil, fish oil, and molasses, from alongside steamship and other points in said New York Harbor to the railway lines and rail terminals of common carriers by railroad located at points contiguous to New York Harbor.

47 3. That throughout said period Erie Railroad Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, were and still are corporation common carriers engaged in the transportation of property, in interstate commerce, by railroad, for hire, and over and by means of their respective connecting railway lines, operated a through railway route for the transportation of property

including palm oil, in carload lots, from alongside vessels in said New York Harbor to a certain point on the line of said The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, to wit, Jeffersonville in the State of Indiana.

4. That throughout said period said common carriers had printed and had published and had filed with the Interstate Commerce Commission schedules of tariffs of rates and charges which showed a joint rate and charge of said carriers for the transportation of palm oil, in carload lots, from said New York Harbor to said Jeffersonville, over said through railway route, of 40 cents per 100 pounds; that said schedules and tariffs providing said rate of 40 cents per 100 pounds further provided that said rate applied from points within free lighterage limits of said New York Harbor as provided for and in accordance with certain tariffs and schedules of rules, regulations and charges governing the acceptance and handling of freight at, and for all deliveries in, said New York Harbor, which said tariffs and schedules had been duly printed and had been published and had been filed with the Interstate Commerce Commission, by said Erie Railroad Company; that said last mentioned tariffs and
48 schedules provided and defined free lighterage and floating limits in said New York Harbor to be:

North River:

New York side—Battery to 135th Street.

New Jersey side—National Storage Docks, Communipaw, to and including Fort Lee, N. J.

East River and Harlem River:

New York side—Battery to Jerome Avenue Bridge, including Harlem River side of Ward's and Randall's Islands.

Brooklyn side—From Pot Cove, Astoria, to and including Newtown and Dutch Kills Creeks, and points in Wallabout Canal, and to Hamilton Avenue Bridge, Gowanus Canal, and to and including 69th Street, South Brooklyn (Bay Ridge).

New York Bay:

Points on north and east shore of Staten Island between Bridge Creek (Arlington) and Clifton, both inclusive, and including Shooter Island.

Points on the New Jersey shore of New York Bay and on the Kill von Kull between Constable Hook and Avenue C, Bayonne City, opposite Port Richmond, S. I.;

that said last mentioned tariffs and schedules further provided that property therein specified as articles "not lighterage free," including palm oil, when loaded in tank cars, would be accorded free floatage privilege in lots of six cars or over, or when loaded in less than six cars, provided the total weight of shipments equaled or exceeded 240,000 pounds; that said last mentioned tariffs and schedules further provided that when such articles therein designated as "not lighterage free," including palm oil, in lots of 240,000 pounds, were handled

in tank barges in lieu of tank cars on floats from alongside steamship and other points in said free lighterage and floatage limits in said New York Harbor, the transfer from barges to tank cars would be at the expense of the shipper, for which service a charge of 2 cents per 100 pounds would be made in addition to the rate from New York; that said rate of 40 cents per 100 pounds and said pumping charge of 2 cents per 100 pounds, were the lawful rates and the only lawful rates applicable on the shipment of palm oil hereinafter described.

5. That prior to September 26, 1932, said Erie Railroad Company and said Manhattan Lighterage Corporation had entered into an agreement and arrangement whereby said Manhattan Lighterage Corporation agreed and undertook, among other things, to furnish all necessary marine equipment and to transport in tank barges of said Manhattan Lighterage Corporation all shipments of oils and other bulk commodities as designated by said Erie Railroad Company from designated points within said free lighterage and floatage limits of said New York Harbor, to designated piers of said Erie Railroad Company in the State of New Jersey and other points, including the pumping of shipments from tank barges into tank cars designated and placed by said Erie Railroad Company on and at said piers, for and at a compensation of, to wit, 6½ cents per 100 pounds; that said arrangement and agreement was in full force and effect throughout all times mentioned in this indictment.

6. That during said period on, to wit, September 26, 1932, said defendant tendered to said Erie Railroad Company at Pier 36, Brooklyn, in the State of New York, being within said free lighterage and floatage limits of said New York Harbor, a shipment of palm oil of an aggregate weight of, to wit, 302,300 pounds, that being 5 carload lots, which said palm oil was a part of a larger lot of oil theretofore transported to said New York Harbor by a certain vessel, to wit, "West Humhaw," with directions to transport said 302,300 pounds of palm oil from said New York Harbor over said connecting railway lines, to said Jeffersonville, consigned to said defendant; that said Erie Railroad Company, by and through its said agent, Manhattan Lighterage Corporation then and there accepted delivery of said palm oil, and said Manhattan Lighterage Corporation, acting for and in behalf of said Erie Railroad Company transported said palm oil by tank barge from said Pier 36 to the rail terminal of said Erie Railroad Company at Long Dock, Jersey City, in the State of New Jersey and at said Long Dock said Manhattan Lighterage Corporation pumped said palm oil into certain railway tank cars, bearing the initials and numbers, TPCX 102, SHPX 9109, SHPX 9101, SHPX 9116, and SHPX 9118; that thereafter said common carriers transported said shipment of palm oil loaded in and upon said railway tank cars, as aforesaid, over said connecting railway line, and in and through the District of New Jersey and within the jurisdiction of this Court, to said Jeffersonville, and did deliver said shipment at said Jeffersonville to said

defendant and did collect freight charges in the amount of $1,209.20 based only upon the aforesaid rate of 40 cents per 100 pounds.

7. That the lawful freight charges applicable upon said ship-
51 ment under the aforesaid tariffs and schedules was $1,269.69 being the sum of said line haul rate of 40 cents per 100 pounds based on the aforesaid weight of, to wit, 302,300 pounds and said pumping charge of 2 cents per 100 pounds based upon the aforesaid weight of, to wit, 302,300 pounds.

8. That in accordance with said arrangement and agreement between said Erie Railroad Company and said Manhattan Lighterage Corporation said Erie Railroad Company did on, to wit, November 13, 1932, pay to said Manhattan Lighterage Corporation the sum of, to wit, $196.50 for the lightering by tank barge of said palm oil from said Pier 36 to said rail terminal of said Erie Railroad Company at said Long Dock and for the pumping of said palm oil from tank barge into said tank railway cars at said Long Dock, said sum of, to wit, $196.50 being based and computed at said rate of 6½ cents per 100 pounds.

9. That on, to wit, October 18, 1932, said Manhattan Lighterage Corporation, pursuant to an arrangement theretofore made with said defendant, and with intent secretly to assume and absorb for the benefit of said defendant said pumping charge of 2 cents per 100 pounds provided in said tariffs and schedules of rules, regulations, and charges at said New York Harbor, printed, published, and filed by said Erie Railroad Company as aforesaid, applicable upon said shipment of palm oil, paid to said Erie Railroad Company, the sum of $60.49, being at the rate of 2 cents per 100 pounds upon the aforesaid weight of, to wit, 302,300 pounds.

52 10. That said Manhattan Lighterage Corporation did assume and absorb, for the benefit and advantage of said defendant, said pumping charge of 2 cents per 100 pounds.

11. That said defendant through and by means of a device employed with purpose to have said Manhattan Lighterage Corporation absorb and assume said pumping charge of 2 cents per 100 pounds, for the benefit and advantage of said defendant, and thereby reduce said lawfully published and filed tariffs, rates, and charges, chargeable to said defendant, as aforesaid, and then and there well knowing the provisions of the aforesaid lawfully published and filed tariffs and schedules, and the premises aforesaid, on, to wit, October 18, 1932 unlawfully did knowingly solicit, accept, and receive from said Manhattan Corporation, a concession and discrimination in the amount of 2 cents on each 100 pounds of said palm oil which was transported from said New York Harbor to said Jeffersonville and in respect to said transportation, whereby said shipment of palm oil was transported by railroad as aforesaid at and for a rate of 40 cents per 100 pounds, which was less than said rates aggregating 42 cents per 100 pounds named in the tariffs and schedules published and filed as aforesaid.

12. And so the Grand Jurors aforesaid, upon their oaths aforesaid, do present and find that said Colgate-Palmolive-Peet Company, defendant aforesaid, in the District of New Jersey and within the jurisdiction of this court, at the time, in the manner and form and
53 through a device as aforesaid, unlawfully did knowingly solicit, accept, and receive a concession and discrimination in respect to the interstate transportation of property conducted by the common carriers aforesaid through said District of New Jersey, whereby said property was transported by said common carriers at a less rate than the published and applicable rate named in the tariffs published and filed as aforesaid; contrary to the statute in such case made and provided and against the peace and dignity of the United States.

54 COUNT 2

And the Grand Jurors aforesaid upon their oaths aforesaid, do further present:

* * * * * * *

4. That throughout said period said common carriers had printed and had published and had filed with the Interstate Commerce Commission schedules of tariffs of rates and charges which showed a joint rate and charge of said carriers for the transportation of palm oil, in carload lots, from said New York Harbor to said Jeffersonville, over said through railway route, of 40 cents per 100 pounds; that said schedules and tariffs providing said rate of 40 cents per 100 pounds further provided that said rate applied from points within free lighterage limits of said New York Harbor as provided for and in accordance with certain tariffs and schedules of rules, regulations and charges governing the acceptance and handling of freight at, and for all deliveries in, said New York Harbor, which said tariffs and schedules had been duly printed and had been published and had been filed with the Interstate Commerce Commission, by said New York, Susquehanna and Western Railroad Company; that said last mentioned tariffs and schedules provided and defined free lighterage and floatage limits in said New York Harbor to be:

North River:

New York side—Battery to 135th Street.

New Jersey side—National Storage Docks, Communipaw, to and including Fort Lee, N. J.

East River and Harlem River:

New York side—Battery to Jerome Avenue Bridge, including Harlem River side of Ward's and Randall's Islands.

55 Brooklyn side—From Pot Cove, Astoria, to and including Newtown and Dutch Kills Creeks, and points in Wallabout Canal, and to Hamilton Avenue Bridge, Gowanus Canal, and to and including 69th Street, South Brooklyn (Bay Ridge).

New York Bay:

"Points on north and east shore of Staten Island between Bridge Creek (Arlington) and Clifton, both inclusive, and including Shooter Island.

Points on the New Jersey shore of New York Bay and on the Kill von Kull between Constable Hook and Avenue C, Bayonne City, opposite Port Richmond, S. I.:

that said last mentioned tariffs and schedules further provided that property therein specified as articles "not lighterage free", including palm oil, when loaded in tank cars, would be accorded free floatage privilege in lots of six cars or over, or when loaded in less than six cars, provided the total weight of shipments equaled or exceeded 240,000 pounds; that said last mentioned tariffs and schedules further provided that when such articles therein designated as "not lighterage free", including palm oil, in lots of 240,000 pounds, were handled in tank barges in lieu of tank cars on floats from alongside steamship and other points in said free lighterage and floatage limits in said New York Harbor, the transfer from barges to tank cars would be at the expense of the shipper, for which service a charge of 2 cents per 100 pounds would be made in addition to the rate from New York; that said rate of 40 cents per 100 pounds and said pumping charge of 2 cents per 100 pounds, were the lawful rates and the only lawful rates applicable on the shipment of palm oil hereinafter described.

56

COUNT 3

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraphs numbered 1, 2, 3, 4, and 5 of the second count of this indictment which said facts are hereby referred to and incorporated in this count as fully as if they were herein repeated.

57

COUNT 4

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraphs numbered 1, 2, 3, 4, and 5 of the second count of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were herein repeated.

58

COUNT 5

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraphs numbered 1, 2, 3, 4, and 5 of the second count of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were herein repeated.

59 COUNT 6

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraphs numbered 1, 2, 3, 4, and 5 of the second count of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were herein repeated.

60 COUNT 7

And the Grand Jurors aforesaid upon their oaths aforesaid, do further present:

* * * * * * *

3. That throughout said period said common carriers had printed and had published and had filed with the Interstate Commerce Commission schedules of tariffs of rates and charges which showed a joint rate and charge of said carriers for the transportation of cocoanut oil, in carload lots, from said New York Harbor to said Milwaukee, over said through railway route, of 40 cents per 100 pounds; that said schedules and tariffs providing said rate of 40 cents per 100 pounds further provided that said rate applied from points within free lighterage limits of said New York Harbor as provided for and in accordance with certain tariffs and schedules of rules, regulations and charges governing the acceptance and handling of freight at, and for all deliveries in, said New York Harbor, which said tariffs and schedules had been duly printed and had been published and had been filed with the Interstate Commerce Commission, by said Lehigh Valley Railroad Company; that said last mentioned tariffs and schedules provided and defined free lighterage and floatage limits in said New York Harbor to be:

North River:

New York side—Battery to 135th Street.

New Jersey side—National Storage Docks, Communipaw, to and including Fort Lee, N. J.

East River and Harlem River:

New York side—Battery to Jerome Avenue Bridge, including Harlem River side of Ward's and Randall's Islands.

Brooklyn side—From Pot Cove, Astoria, to and including

61 Newtown and Dutch Kills Creeks, and points in Wallabout Canal, and to Hamilton Avenue Bridge, Gowanus Canal, and to and including 69th Street, South Brooklyn (Bay Ridge).

New York Bay:

Points on north and east shore of Staten Island between Bridge Creek (Arlington) and Clifton, both inclusive, and including Shooter Island.

Points on the New Jersey shore of New York Bay and on the Kill von Kull between Constable Hook and Avenue C, Bayonne City, opposite Port Richmond, S. I.:

that said last mentioned tariffs and schedules further provided that property therein specified as articles "not lighterage free," including cocoanut oil, when loaded in tank cars, would be accorded free floatage privilege in lots of six cars or over, or when loaded in less than six cars, provided the total weight of shipments equaled or exceeded 240,000 pounds; that said last mentioned tariffs and schedules further provided that when such articles therein designated as "not lighterage free," including cocoanut oil, in lots of 240,000 pounds, were handled in tank barges in lieu of tank cars on floats from alongside steamship and other points in said free lighterage and floatage limits in said New York Harbor, the transfer from barges to tank cars would be at the expense of the shipper, for which service a charge of 2 cents per 100 pounds would be made in addition to the rate from New York; that said rate of 40 cents per 100 pounds and said pumping charge of 2 cents per 100 pounds, were the lawful rates and the only lawful rates applicable on the shipment of cocoanut oil hereinafter described.

62 COUNT 8

And the Grand Jurors aforesaid upon their oaths aforesaid, do further present:

* * * * * * * *

4. That throughout said period said common carriers had printed and had published and had filed with the Interstate Commerce Commission schedules of tariffs of rates and charges which showed a joint rate and charge of said carriers for the transportation of palm oil, in carload lots, from said New York Harbor to said Jeffersonville, over said through railway route, of 40 cents per 100 pounds; that said schedules and tariffs providing said rate of 40 cents per 100 pounds further provided that said rate applied from points within free lighterage limits of said New York Harbor as provided for and in accordance with certain tariffs and schedules of rules, regulations, and charges governing the acceptance and handling of freight at, and for all deliveries in, said New York Harbor, which said tariffs and schedules had been duly printed and had been published and had been filed with the Interstate Commerce Commission, by said Lehigh Valley Railroad Company; that said last mentioned tariffs and schedules provided and defined free lighterage and floating limits in said New York Harbor to be:

North River:
New York side—Battery to 135th Street.
New Jersey side—National Storage Docks, Communipaw, to and including Fort Lee, N. J.
East River and Harlem River:
New York side—Battery to Jerome Avenue Bridge, including Harlem River side of Ward's and Randall's Islands.

Brooklyn side—From Pot Cove, Astoria, to and including Newtown and Dutch Kills Creek, and points in Wallabout Canal, and to Hamilton Avenue Bridge, Gowanus Canal, and to and including 69th Street, South Brooklyn (Bay Ridge).

63 New York Bay:

Points on north and east shore of Staten Island between Bridge Creek (Arlington) and Clifton, both inclusive, and including Shooter Island.

Points on the New Jersey shore of New York Bay and on the Kill von Kull between Constable Hook and Avenue C, Bayonne City, opposite Port Richmond, S. I.;

that said last mentioned tariffs and schedules further provided that property therein specified as articles "not lighterage free," including palm oil, when loaded in tank cars, would be accorded free floatage privilege in lots of six cars or over, or when loaded in less than six cars, provided the total weight of shipments equaled or exceeded 240,000 pounds; that said last mentioned tariffs and schedules further provided that when such articles therein designated as "not lighterage free," including palm oil, in lots of 240,000 pounds, were handled in tank barges in lieu of tank cars on floats from alongside steamship and other points in said free lighterage and floatage limits in said New York Harbor, the transfer from barges to tank cars would be at the expense of the shipper, for which service a charge of 2 cents per 100 pounds would be made in addition to the rate from New York; that said rate of 40 cents per 100 pounds and said pumping charge of 2 cents per 100 pounds, were the lawful rates and the only lawful rates applicable on the shipment of palm oil hereinafter described.

64 COUNT 9

And the Grand Jurors aforesaid upon their oaths aforesaid, do further present:

* * * * * * *

4. That throughout said period said common carriers had printed and had published and had filed with the Interstate Commerce Commission schedules of tariffs of rates and charges which showed a joint rate and charge of said carriers for the transportation of palm oil, in carload lots, from said New York Harbor to said Jeffersonville, over said through railway route, of 40 cents per 100 pounds; that said schedules and tariffs providing said rate of 40 cents per 100 pounds further provided that said rate applied from points within free lighterage limits of said New York Harbor as provided for and in accordance with certain tariffs and schedules of rules, regulations, and charges governing the acceptance and handling of freight at, and for all deliveries in, said New York Harbor, which said tariffs and schedules had been duly printed and had been published and had been filed with the Interstate Commerce Commission, by said The New York Central Railroad Company; that said last men-

ned tariffs and schedules provided and defined free lighterage and atage limits in said New York Harbor to be:

North River:

New York side—Battery to 135th Street.

New Jersey side—National Storage Docks, Communipaw, to and including Fort Lee, N. J.

East River and Harlem River:

New York side—Battery to Jerome Avenue Bridge, including Harlem River side of Ward's and Randall's Islands.

Brooklyn side—From Pot Cove, Astoria, to and including Newtown and Dutch Kills Creeks, and points in Wallabout Canal, and to Hamilton Avenue Bridge, Gowanus Canal, and to and including 69th Street, South Brooklyn (Bay Ridge).

New York Bay:

Points on north and east shore of Staten Island between Bridge Creek (Arlington) and Clifton, both inclusive, and including Shooter Island.

Points on the New Jersey shore of New York Bay and on the Kill von Kull between Constable Hook and Avenue C, Bayonne City, opposite Port Richmond, S. I.:

t said last mentioned tariffs and schedules further provided that perty therein specified as articles "not lighterage free," including m oil, when loaded in tank cars, would be accorded free floatage vilege in lots of six cars or over, or when loaded in less than six s, provided the total weight of shipments equaled or exceeded ,000 pounds; that said last mentioned tariffs and schedules fur- r provided that when such articles therein designated as "not hterage free," including palm oil, in lots of 240,000 pounds, were ndled in tank barges in lieu of tank cars on floats from alongside amship and other points in said free lighterage and floatage limits said New York Harbor, the transfer from barges to tank cars uld be at the expense of the shipper, for which service a charge 2 cents per 100 pounds would be made in addition to the rate m New York; that said rate of 40 cents per 100 pounds and said nping charge of 2 cents per 100 pounds, were the lawful rates l the only lawful rates applicable on the shipment of palm oil einafter described.

COUNT 10

And the Grand Jurors aforesaid upon their oaths aforesaid, do ther present:

* * * * * * *

That throughout said period said common carriers had printed l had published and had filed with the Interstate Commerce Commsion schedules of tariffs of rates and charges which showed a joint and charge of said carriers for the transportation of palm oil,

in carload lots, from said New York Harbor to said Jeffersonville, over said through railway route, of 40 cents per 100 pounds; that said schedules and tariffs providing said rate of 40 cents per 100 pounds further provided that said rate applied from points within free lighterage limits of said New York Harbor as provided for and in accordance with certain tariffs and schedules of rules, regulations and charges governing the acceptance and handling of freight at, and for all deliveries in, said New York Harbor, which said tariffs and schedules had been duly printed and had been published and had been filed with the Interstate Commerce Commission, by said The Delaware, Lackawanna and Western Railroad Company; that said last mentioned tariffs and schedules provided and defined free lighterage and floatage limits in said New York Harbor to be:

North River:

New York side—Battery to 135th Street.

New Jersey side—National Storage Docks, Communipaw, to and including Fort Lee, N. J.

67 East River and Harlem River.

New York side—Battery to Jerome Avenue Bridge, including Harlem River side of Ward's and Randall's Islands. dall's Islands.

Brooklyn side—From Pot Cove, Astoria, to and including Newtown and Dutch Kills Creeks, and points in Wallabout Canal, and to Hamilton Avenue Bridge, Gowanus Canal, and to and including 69th Street, South Brooklyn (Bay Ridge).

New York Bay:

Points on north and east shore of Staten Island between Bridge Creek (Arlington) and Clifton, both inclusive, and including Shooter Island.

Points on the New Jersey shore of New York Bay and on the Kill von Kull between Constable Hook and Avenue C, Bayonne City, opposite Port Richmond, S. I.:

that said last mentioned tariffs and schedules further provided that property therein specified as articles "not lighterage free," including palm oil, when loaded in tank cars, would be accorded free floatage privilege in lots of six cars or over, or when loaded in less than six cars, provided the total weight of shipments equaled or exceeded 240,000 pounds; that said last mentioned tariffs and schedules further provided that when such articles therein designated as "not lighterage free," including palm oil, in lots of 240,000 pounds, were handled in tank barges in lieu of tank cars on floats from alongside steamship and other points in said free lighterage and floatage limits in said New York Harbor, the transfer from barges to tank cars would be at the expense of the shipper, for which service a charge of 2 cents per 100 pounds would be made in addition to the rate from New York; that said rate of 40 cents per 100 pounds and said pumping

harge of 2 cents per 100 pounds, were the lawful rates and the only awful rates applicable on the shipment of palm oil hereinafter described.

In United States District Court, District of New Jersey

UNITED STATES OF AMERICA

vs.

COLGATE-PALMOLIVE-PEET COMPANY

Motion to quash

Filed July 19, 1934

And now comes the defendant herein by Wall, Haight, Carey & Hartpence, its attorneys, and says that the indictment herein and each and every count thereof are not sufficient in law to require the defendant to plead thereto, and this defendant moves the Court to quash the indictment and each and every count thereof, and for special reasons shows unto the Court the following:

1. The tariffs and schedules referred to in all the counts of the indictment provided as follows:

"Property loaded in tank cars will be accorded free floatage privileges in lots of six cars or over, and when loaded in less than six cars provided the total weight of shipment exceeds or equals 240,000 pounds.

"When ordered by the shipper or consignee in writing, and tank barges are available, vegetable oils * * * in lots of 240,000 pounds or more, may be handled in tank barges in lieu of tank cars on floats from or to alongside steamship and points within free lighterage limits of New York Harbor. Transfer from barges to tank cars or from tank cars to barges to be at expense of shipper or consignee, for which service a charge of 2 cents per 100 pounds will be made in addition to the rates from or to New York."

That is to say, said tariffs and schedules did not provide for or require said service charge of 2¢ per hundred pounds for transferring oil from tank barges to tank cars, or the payment thereof by any shipper or consignee, unless the handling of the oils so pumped within free lighterage limits of New York Harbor in tank barges, in lieu of tank cars on floats, had been ordered in writing, by the shipper or the consignee thereof, so that in the absence of such a written order payment of such charge on behalf of a shipper or consignee by any other person, whatsoever, did not constitute the payment of any sum required to be paid by such shipper or consignee for transportation of oil by any tariff or schedule published and filed with the Interstate Commerce Commission, and such payment did not constitute a rebate or concession from any rate established by such tariff or schedule or a discrimination with respect to any such rate.

It is not alleged in any count in the indictment either that this defendant as shipper, or that the consignee gave such order in writing as aforesaid with respect to the handling of the oil mentioned in any count thereof.

Wherefore, this defendant respectfully prays that the indictment be quashed and held for nought.

WALL, HAIGHT, CAREY & HARTPENCE.
Attorneys for Defendant,
Colgate-Palmolive-Peet Company.

70 [File endorsement omitted.]

71 [Clerk's certificate to foregoing papers, omitted in printing.]

72 In United States District Court, District of New Jersey

On Motion to Quash Indictment No. 6821–b

UNITED STATES OF AMERICA

vs.

DURKEE FAMOUS FOODS, INC., DEFENDANT

Appearances: Harlan Besson, Esq., United States Attorney. Daniel H. Kunkel, Esq., Special Assistant United States Attorney. Burt L. Smelker, Esq., Attorney for Interstate Commerce Commission, opposed. Roger Hinds, Esq., Attorney for Durkee Famous Foods, Inc., for the motion.

Memorandum

Filed Jan. 14, 1937

FAKE, District Judge:

The indictment here is intended to charge an offense against the provisions of Section 1 of the Elkins Act, Sec. 41, Title 49, U. S. C. A. The gist of the issue before me resides in the allegation in the indictment that the defendant "through a device aforesaid, unlawfully did knowingly solicit, accept, and receive a concession and discrimination in respect to interstate transportation of property * * *

73 whereby said property was transported by said common carriers at a less rate than the published an applicable rate named in the tariffs published and filed as aforesaid; contrary to the statute in such case made and provided."

Section 41 of the Act makes it a criminal offense to "accept or receive any rebate concession, or discrimination in respect to transportation of any property * * * whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier."

The indictment discloses that the rate involved is 40 cents per hundred pounds and in addition thereto a charge of 2 cents per 100 pounds, referred to as a pumping charge. The issue here is based entirely on the 2 cent pumping charge. On this point the indictment reads as follows: "That said defendant did assume and absorb, for

he benefit and advantage of said Durkee Famous Foods, Inc., said umping charge of 2 cents per 100 pounds."

This leads to an examination of the rule or tariff for the purpose of ecertaining when and under what circumstances the 2 cent pumping harge may become effective. By stipulation in writing between the parties it is agreed that the item for pumping arises if at all under a rule reading as follows:

"Property loaded in tank cars will be accorded free floatage rivileges in lots of six cars or over, or when loaded in less than six ars provided the total weight of shipment exceeds or equals 240,000 ounds.

"When ordered by the shipper or consignee, in writing, and tank arges are available, Vegetable Oils, Foots, Settlings and Tank Bot-oms and Fish, Sea Animal, Whale Oils, Linseed Oil, and Molasses lots of 240,000 pounds or more, may be handled in tank barges in eu of tank cars on floats from or to alongside steamship and points ithin free lighterage limits of New York Harbor. Transfer from arges to tank cars or from tank cars to barges to be at expense of ipper or consignee for which service a charge of 2 cents per 100 ounds will be made in addition to the rates from or to New York."

It should be noted that while the indictment is found under the lkins Act, the crime involved is not fully defined in that Act. We e compelled to look elsewhere for the factors which lead to a com-ete definition. We find these factors in the filed tariff (rule) and for esent purposes they have the same force and effect as statutory ovisions. Looking then to the tariff, it will be seen, among other ings, that the 2 cent charge does not become effective unless tank arges are "* * * ordered by the shipper or consignee, in writing, d tank barges are available, * * *." These requirements are nditions precedent to the right to bill or assess the 2 cent charge.

It, therefore, follows that no criminal concession or discrimination can be spelled out under the Elkins Act when read with the tariff unless these essential conditions are met in the lan-age of the indictment. The indictment is silent on that subject, erefore, it charges no crime and the motion to quash must be anted. See United States v. Cook, 84 U. S. 186; Davis v. Hender-n, 266 U. S. 92; U. S. v. Olds Motor Works, 4 Fed. Supp. 65; and United States v. Wood, 159 Fed. 187.

[File endorsement omitted.]

In United States District Court, District of New Jersey

On Motion to Quash Indictment No. 6821-B

UNITED STATES OF AMERICA

vs.

DURKEE FAMOUS FOODS, INC., DEFENDANT

Appearances: Harlan Besson, Esq., United States Attorney. Dan-H. Kunkel, Esq., Special Assistant United States Attorney. Burt

L. Smelker, Esq., Attorney for Interstate Commerce Commissio
Opposed. Roger Hinds, Esq., Attorney for Durkee Famous Foo
Inc., for the motion.

Memorandum correcting and amending a memorandum filed in thi cause on January 14, 1937

Filed Jan. 25, 1937

FAKE, District Judge:

The memorandum filed by me in the above entitled cause on the 14t day of January 1937 is hereby corrected and amended as follow Strike out the paragraph on page 2 of the aforesaid memorandu which reads as follows:

"The indictment discloses that the rate involved is 40 cents p hundred pounds and in addition thereto a charge of 2 cents per 1 pounds, referred to as a pumping charge. The issue here is base entirely on the 2 cent pumping charge. On this point the indictme reads as follows: 'That said defendant did assume and absorb for th benefit and advantage of said Durkee Famous Foods, Inc., said pump ing charge of 2 cents per 100 pounds.'"

And insert in lieu thereof, the following paragraph:

78 The indictment discloses that the rate involved is 40 cents p hundred pounds and in addition thereto a charge of 2 cents p 100 pounds, referred to as a pumping charge. The issue here is ba entirely on the 2 cent pumping charge. On this point the indictme reads as follows: "That said Manhattan Lighterage Company di assume and absorb, for the advantage of said defendant, said pump ing charge of 2 cents per 100 pounds."

79 [File endorsement omitted.]

80 [Clerk's certificate to foregoing papers omitted in printing.

81 Supreme Court of the United States

Stipulation re enlargement of record, etc.

A motion of defendant-appellee to enlarge the record in this mat ter by adding thereto:

1. Memorandum opinion of the United States District Court file January 14, 1937, in United States vs. Durkee Famous Foods, In (No. 6821-b), supporting the order referred to in the plea in bar an answer herein quashing the previous indictment herein (Crimina No. 6817-b).

2. Correcting memorandum opinion of said United States Distric Court filed January 25, 1937, correcting the above mentioned opinio (Criminal No. 6821-b).

3. Motion to quash said previous indictment, filed on or about July 19, 1934 (Criminal No. 6817-b), referred to in the plea in bar an answer herein.

4. Prior indictment herein said United States District Court re turned and filed at the April 1934 term of said District Cour (Criminal No. 6817-b).

having been granted by the Court without objection of the Solicitor General, it is hereby

Stipulated, that in so far as the said prior indictment is concerned only the following parts need be printed:

(a) The first count in full;

(b) Paragraph "4" of Counts 2, 8, 9 and 10.

82 (c) Paragraph "1" of Counts 3, 4, 5, and 6.

(d) Paragraph "3" of Count 7.

and it is further

Stipulated, that the said first count is typical of all of the counts of said prior indictment.

Dated Newark, N. J., November 28, 1938.

ROBERT H. JACKSON.
Solicitor General of the United States.

JOHN A. HARTPENCE,
Counsel for Appellee, Colgate-Palmolive-Peet Company.

83 In the Supreme Court of the United States

Statement of points and designation of record to be printed

Filed Aug. 30, 1938

I

United States of America, appellant, states that in its brief and oral argument on its appeal in the above-entitled cause it will rely upon the points stated in its assignment of errors therein.

II

The entire record in this cause as filed in this Court is necessary for consideration of the points stated by appellant, and the entire transcript of record as transmitted by the Clerk of the District Court should be printed by the Clerk of this Court.

ROBERT H. JACKSON,
Robert H. Jackson,
Solicitor General.

AUGUST —, 1938.

Service of a copy of the above Statement of Points and Designation of Record to be Printed acknowledged August 24, 1938.

WALL, HAIGHT, CASEY & HARTPENCE.
Counsel for Appellee.

[File endorsement omitted.]

[Endorsed on cover:] Enter: Attorney General. File No. 42,796. New Jersey, D. C. U. S. Term No. 311. The United States of America, Appellant vs. Colgate-Palmolive-Peet Company. Filed August 30, 1938. Term No. 311 O. T. 1938.

U. S. GOVERNMENT PRINTING OFFICE: 1938